5-7-2013

State v. Devan Respondent's Brief Dckt. 39853

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 39853
Plaintiff-Respondent,	)	
	)	Canyon Co. Case No.
vs.	)	CR-2011-20517
	)	CR-2011-20535
EVIN CHRISTOPHER DEVAN,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

Nature of the Case 1

Statement of Facts and Course of Proceedings 1

ISSUES 2

ARGUMENT 3

Devan Has Failed To Show Error, Much Less Fundamental Error, Because Idaho Case Law Supports That The Prosecutor's Comments At Issue Here Were Not Misconduct 3

A. Introduction 3

B. Legal Review 3

C. Under Idaho Case Law, The Prosecutor's Comments Were Not Misconduct, Thus There Was No Error 4

D. The Alleged Errors Were Harmless 6

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

CASES **PAGE**

State v. Baruth, 107 Idaho 651, 691 P.2d 1266 (Ct. App. 1985) 6

State v. Beebe, 145 Idaho 570, 181 P.3d 496 (Ct. App. 2007) 6

State v. Gross, 146 Idaho 15, 189 P.3d 477 (Ct. App. 2008) 5

State v. Marmentini, 152 Idaho 269, 270 P.3d 1054 (Ct. App. 2011) 4

State v. Norton, 151 Idaho 176, 24 P.3d 77 (Ct. App. 2011) ..... passim

State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010) 3, 6

State v. Phillips, 144 Idaho 82, 156 P.3d 583 (Ct. App. 2008) 5

State v. Thompson, 132 Idaho 628, 977, P.2d 890 (1999) 3

State v. Troutman, 148 Idaho 904, 231 P.3d 549 (Ct. App. 2010) 5

STATEMENT OF THE CASE

Nature of the Case

Evin Christopher Devan appeals his conviction from a jury verdict finding him guilty of felony counts of conspiracy and burglary, and a misdemeanor count of trespassing.

Statement of Facts and Course of Proceedings

A jury found Evin Christopher Devan guilty of felony conspiracy, felony burglary, and misdemeanor trespassing. (R., Vol. I, pp. 19-21, 82-83; Vol. II, pp. 151, 232.) The district court sentenced Devan to a unified term of five years with two years fixed on each felony count, but suspended execution of judgment and ordered probation. (R., Vol. I, pp. 120-21.) Devan timely appealed. (R., Vol. II, pp. 127-28.)

During closing argument, the prosecutor commented that "the argument[s] of the lawyers" were "gobbledygook" to the extent they conflicted with the court's instructions. (Trial Tr., p. 614, L. 19 – p. 615, L. 6.) The prosecutor also stated that the defense argument that an expert was needed to compare footprints in the case was "insulting" because the comparison could be made using "common sense." (Trial Tr., p. 616, L. 10 – p. 617, L. 1.) Devan's sole issue on this appeal challenges the prosecutor's comments as fundamental error. (Appellant's brief, p. 10.)

ISSUES

Devan states the issue on appeal as:

> Did the prosecutor commit misconduct, rising to the level of fundamental error, when the prosecutor used inflammatory language calculated to appeal to the passions and prejudice of the jury, disparaged defense counsel, and misstated the arguments raised by defense counsel?

(Appellant's brief, p. 10.)

The state rephrases the issue as:

Has Devan failed to show error, much less fundamental error, because Idaho case law supports that the prosecutor's comments at issue here were not misconduct?

ARGUMENT

Devan Has Failed To Show Error, Much Less Fundamental Error, Because Idaho Case Law Supports That The Prosecutor's Comments At Issue Here Were Not Misconduct

A. Introduction

Devan argues the prosecutor committed misconduct that infringed on his right to a fair trial. (Appellant's brief, p. 13.) Although the alleged misconduct was not objected to at trial, Devan asserts it rose to the level of fundamental error thus warranting reversal. (Id.) Applying Idaho case law to the record, Devan fails to satisfy his burden on appeal.

B. Legal Standard

In general, Idaho's appellate courts will not consider allegations of error to which counsel has failed to timely object at trial. State v. Norton, 151 Idaho 176, 181, 24 P.3d 77, 82 (Ct. App. 2011) (citing State v. Thompson, 132 Idaho 628, 634, 977, P.2d 890, 896 (1999). The exception is in criminal cases where the defendant shows fundamental error. Norton, 151 Idaho at 181, 24 P.3d at 82. For this, a defendant must show error that (1) violates an unwaived constitutional right, (2) is clear or obvious from the appellate record, (3) and that affected the outcome of defendant's trial. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010)). As an initial matter, if the appellate court finds no error, it need not address the three-prong test. Norton, 151 Idaho at 189, 254 P.3d at 90. As discussed below, there was no error here.

C. Under Idaho Case Law, The Prosecutor's Comments Were Not Misconduct, Thus There Was No Error

Parties at trial are given considerable latitude in making closing arguments to the jury. State v. Marmentini, 152 Idaho 269, 271, 270 P.3d 1054, 1056 (Ct. App. 2011). Although prosecutors are "expected and required to be fair," the courts recognize the reality that "[a] fair trial is not necessarily a perfect trial." Norton, 151 Idaho at 188, 254 P.3d at 89 (citation omitted). In Norton, the Court of Appeals held that the prosecutor's references to defense arguments as "red herrings and smoke and mirrors" were not misconduct. Norton, 151 Idaho at 189, 254 P.3d at 90. In so holding, the court specifically noted that the comments were not directed at defense counsel personally, but at counsel's theories. Id.

In arguing that the prosecutor committed misconduct, Devan misquotes and thus mischaracterizes the prosecutor's closing argument. (See Appellant's brief, p. 13.) An accurate quote, in its proper context shows the prosecutor's intent to clarify the correct legal standard for the jury to apply:

> Gobbledygook, that's what the argument of the lawyers are, and that's what the judge has instructed you to do (indicating). So the first thing I'm going to ask you to do is throw out all of the argument that the defense attorney gave you about clear and convincing evidence, yadda, yadda, yadda. That's not the standard. You won't find it anywhere in your jury instructions. You have an instruction on what reasonable doubt is. If you have any doubt about it, read it. It doesn't say anything about clear and convincing evidence. To compare the two is an error.

(Trial Tr., p. 614, L. 19 – p. 615, L. 6.) The prosecutor argued the jury should disregard the defense argument about "clear and convincing evidence" because it is not the correct standard, and is thus contrary to the judge's instructions.

(See also Trial Tr., p. 615, Ls. 7-16.) Because the comment was directed at defense argument, it is not misconduct. Norton, 151 Idaho at 189, 254 P.3d at 90.

Devan also argues the prosecutor's use of the word "insulting" was inflammatory, and therefore misconduct. (Appellant's brief, pp. 13-14.) In the comment in question, the prosecutor challenged the defense argument that expert testimony was needed to compare footprints, calling it "insulting." (See Trial Tr., p. 609, L. 12 – p. 610, L. 25; p. 616, Ls. 10-15.) In other words, the prosecutor told jurors he trusted them to evaluate the evidence without needing an expert to do the evaluating for them. (Trial Tr., p. 616, Ls. 16-22.) The context of the prosecutor's comments shows they were made in response to the defense's arguments and were not calculated to inflame the emotions and passions of jurors. See State v. Troutman, 148 Idaho 904, 909, 231 P.3d 549, 554 (Ct. App. 2010). Thus Devan's argument fails.

Devan cites several cases in which the courts found prosecutorial misconduct. (Appellant's brief, pp. 12-13.) Those cases are distinguishable because the alleged misconduct was not, as here, prosecutorial comments directed at defense arguments. Troutman, 148 Idaho at 909-10, 231 P.3d at 554-55 (prosecutor's comments improperly urged jury to return verdict based on emotions and passions rather than evidence); State v. Gross, 146 Idaho 15, 20, 189 P.3d 477, 482 (Ct. App. 2008) (prosecutor's statements improperly vouched for state and state's witness); State v. Phillips, 144 Idaho 82, 87, 156 P.3d 583, 588 (Ct. App. 2008) (prosecutor comments that jury might be irritated by

testimony of defendant's girlfriend and brother were improper); State v. Beebe, 145 Idaho 570, 575-76, 181 P.3d 496, 501-02 (Ct. App. 2007) (prosecutor improperly misrepresented or mischaracterized evidence, appealed to jury to consider factors other than evidence of guilt); State v. Baruth, 107 Idaho 651, 657, 691 P.2d 1266, 1272 (Ct. App. 1985) (inflammatory statements by prosecutor implying "facts" not in evidence were improper).

Because Devan cannot establish misconduct, there simply is no error, and the court need not address the three-prong fundamental error inquiry. Norton, 151 Idaho at 189, 254 P.3d at 90. Indeed, absent error, all three prongs of the Perry test – violation of unwaived rights, clear error, and prejudice – are not satisfied. See Perry, 150 Idaho at 226, 245 P.3d at 978. Even if the comments were error satisfying the first two prongs of the fundamental error standard, Devan cannot show the remaining prong, that the alleged errors affected the outcome of his trial.

D. The Alleged Errors Were Harmless

For the third prong of the Perry fundamental error test, defendant bears the burden of proving a reasonable probability that the asserted error affected the outcome of his case. Perry, 150 Idaho at 226, 245 P.3d at 978. The overwhelming evidence supports that the jury reached its verdict regardless of the alleged prosecutorial misconduct – the prosecutor's comments in closing. Co-defendant Darrin Boren testified that Devan participated, with six others, in a plan to commit burglary. (Trial Tr., p. 348, L. 13 – p. 351, L. 8; p. 353, L. 2 – p. 356, L. 4; p. 359, L. 17 – p. 361, L. 23; p. 362, Ls. 2-23; p. 363, Ls. 1-19; p. 364,

Ls. 2-5; p. 366, Ls. 9-16.) Co-defendant Tiffany Jones also testified that Devan was part of the group that went to burglarize the property, and that she and Devan were in the car that drove away from the scene of the crime. (Trial Tr., p. 427, L. 24 – p. 428, L. 22; p. 429, Ls. 7-21; p. 430, Ls. 1-17.) Jones testified that during the planning, Devan said, referring to the burglary, "let's go and get this done." (Trial Tr., p. 431, Ls. 10-20.)

Testimony by Police Officer Dale Schreiber further confirmed Devan's involvement. Officer Schreiber testified that, as part of the burglary investigation, he was sent to look for a vehicle with the license plate 2CFX260 that was reported leaving the scene of the burglary. (Trial Tr., p. 400, Ls. 1-3; p. 400, L. 24 – p. 401, L. 9; p. 401, L. 19 – p. 402, L. 19.) Using the plate number, Officer Schreiber found the vehicle was registered to Maribel McMinn, residing at 516 Ash. (Trial Tr., p. 403, Ls. 3-14.) At trial, Devan confirmed that his mother's name is Maribel Nelson, maiden name McMinn, and that he resides with her at 516 Ash. (Trial Tr., p. 509, L. 14 – p. 510, L. 1.)

After spotting the vehicle in a motel parking lot, Officer Schreiber parked 40 or 50 yards away and conducted surveillance. (Trial Tr., p. 403, L. 21 – p. 405, L. 2; p. 408, Ls. 2-13.) Within 15 minutes, a man later identified as Devan approached Officer Schreiber, concerned he was being followed. (Trial Tr., p. 409, L. 13 – p. 410, L. 21.) Upon Officer Schreiber's request, Devan produced his driver's license which showed his address as 516 Ash, the same as that associated with the suspect vehicle. (Trial Tr., p. 411, Ls. 3-24.)

Devan points out that the victim, Karl Riebe, could not identify Devan as one of the burglars. (Appellant's brief, p. 15; Trial Tr., p. 217, L. 16 – 219, p. 10 (victim confronted two women in one car, at close range); Trial Tr., p. 229, Ls. 1-19 (911 dispatch, which Riebe called, told him to stay concealed).) However, Riebe testified that there were several people and two distinct cars involved, including the vehicle with license plate 2CFX260. (Trial Tr., p. 228, L. 4 – p. 231, L. 24.) Also, Devan's self-serving testimony that he was not involved in the conspiracy is plainly insufficient to overcome the vast weight of evidence supporting the jury's verdict against him. (Trial Tr., p. 512, Ls. 18-25.)

Given the weight of evidence against Devan, he cannot show a reasonable probability that the jury's verdict was swayed by the prosecutor's comments in closing argument. See Perry, 150 Idaho at 226, 245 P.3d at 978. Rather, the record amply supports that the jury's verdict was reached without regard to those comments. Even if Devan could show the prosecutor's comments amounted to error, he has not shown the error affected the outcome of his case. Id. Accordingly, Devan has failed to demonstrate fundamental error from prosecutorial misconduct. Id.

CONCLUSION

The state respectfully requests that this Court affirm the district court's judgment of conviction.

DATED this 7th day of May, 2013.

DAPHNE J. HUANG
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of May, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SARAH E. TOMPKINS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

DAPHNE J. HUANG
Deputy Attorney General

DJH/pm